In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-29

VERNON W. MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the Western District of Pennsylvania, petitioner was found guilty on four counts of having willfully attempted to evade his taxes for the years 1964, 1965, 1966 and 1967 by filing fraudulent tax returns in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 3a). On June 15, 1971, petitioner filed a motion for a new trial and a motion for judgment of acquittal, both of which the court denied on December 13, 1971. Petitioner then filed, on December 22, 1971, a notice of appeal from the denial of the motion for a new trial and motion for judgment of acquittal (Pet. App. 29).

Five days later, on December 27, 1971, the district court sentenced petitioner to four months' imprisonment, with probation for three years, imposed a $20,000 fine and entered its judgment and order (R. 5a). At sentencing, the court advised petitioner's counsel that the notice of appeal filed on December 22, 1971, was premature and that petitioner had the right to appeal within ten days from the imposition of sentence (Pet. App. 31 n. 2). Petitioner's counsel said that he knew the December 22 notice of appeal was premature after he "went back and read the rules" (*ibid.*). However, he did not file a notice of appeal from the judgment and order of December 27, 1971, until January 7, 1972, after eleven days had elapsed and after the ten-day time period prescribed in Rule 4(b), Fed. R. App. P., had expired (*id.* at 29). The court of appeals held that notice of appeal was untimely and dismissed the appeal for want of jurisdiction (*id.* at 31).

2. The court below correctly held that petitioner's December 22 notice of appeal was ineffective because it sought review of the district court's denial of his motion for a new trial and judgment of acquittal, neither of which are appealable orders (Pet. App. 29). See *Corey* v. *United States*, 375 U.S. 169, 172; *Berman* v. *United States*, 302 U.S. 211, 212-213. Petitioner's counsel himself recognized this (Pet. App. 31 n. 2). The court of appeals also correctly held that petitioner's notice of appeal of January 7, 1972, could not confer jurisdiction because it was out of time under Rule 4(b), Fed. R. App. P.[1]

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[1] The court of appeals also stated that "Although we find that because this appeal was not timely filed we are without jurisdiction,

Petitioner argues that his December 22 notice comes within the second sentence of Rule 4(b): "A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof." But the court below properly held that this is of no assistance to petitioner since his December 22 notice of appeal was filed before the announcement of his sentence, not after sentencing but before the entry of judgment (Pet. App. 31 n. 2). Cf. *United States* v. *Pardee*, 356 F. 2d 982 (C.A. 4). The second sentence of Rule 4(b) contemplates a situation where the decision, sentence or order is final and the only thing left to be done is to enter the judgment or order.[2]

If petitioner is to be relieved of the ten-day limit in Rule 4(b) he must therefore bring himself within the provision in the Rule recognizing an exception for "excusable neglect." But petitioner has offered no reason for the late filing and the record shows that his counsel knew of the ten-day requirement and was specifically advised of it by the district court at the time of sentencing. In these circumstances, under *United States* v.

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we have examined all of appellant's contentions advanced in brief and oral argument, and we find them to be without merit" (Pet. App. 31).

[2] The second sentence of Rule 4(b) codifies the holding in *Lemke* v. *United States*, 346 U.S. 325, where the Court stated that a notice of appeal filed after sentencing but before entry of final judgment would confer jurisdiction on the court of appeals since it "gave full notice • • • of the sentence and judgment which petitioner challenged." 346 U.S. at 326. See 8A *Moore's Federal Practice* ¶37.01[3] (2d ed. 1970). Petitioner's December 22 notice in this case, however, did not give such notice. See Pet. 3. Instead, it stated only that petitioner appeals from the denial of his motions for a judgment of acquittal and a new trial.

Robinson, 361 U.S. 220, the court of appeals properly dismissed the appeal for want of jurisdiction.

Petitioner argues that the decision below conflicts with *Belton* v. *United States,* 259 F. 2d 811 (C.A. D.C.). But that case was decided before the 1966 revisions to Rule 4(b) upon which petitioner relies and upon the interpretation of which the court below rested its decision. Moreover, the notice of appeal in *Belton* was filed by the defendant, who was indigent and not represented by an attorney, and thus would presumably have come within the portion of Rule 4(b) regarding excusable neglect to file within ten days after judgment. See *Johnson* v. *United States,* 405 F. 2d 1072 (C.A. D.C.). However, even if *Belton* and this case were considered to be in conflict we believe the issue lacks sufficient importance for review by this Court.

Petitioner also contends that the Third Circuit's decision here is inconsistent with its decision in *United States* v. *Kokin,* 365 F. 2d 595;[3] but cf. *United States* v. *Battista,* 418 F. 2d 572 (C.A. 3). This contention may warrant *en banc* review by the court of appeals but the fact that a later decision of the court of appeals appears at odds with an earlier decision by the same court does not warrant review by this Court, particularly where, as here, the narrow issue involved is not of substantial public importance.[4]

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[3] The court's *per curiam* opinion in *Kokin* gives no indication that the defendant there or his attorney was specifically advised that his notice of appeal after conviction but before sentencing was premature. In this case, however, petitioner's counsel did receive such advice from the trial court.

[4] The court below took its prior decision in *Kokin* into account in deciding this case (Pet. App. 30n. 1).

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

☆ U.S. Government Printing Office: 1972—473-890/1918